NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

RINA SHOTLAND; MICHELLE YACOBOV, a minor, through her guardian ad litem, Natalie Yacobov,

Plaintiffs - Appellees,

v.

CITY OF TORRANCE, a public entity,

Defendant,

and

MARTIN VUKOTIC, Officer; HECTOR BERMUDEZ, Officer,

Defendants - Appellants.

No. 04-55837

D.C. No. CV-03-04739-SVW

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Argued and Submitted February 8, 2006
Pasadena, California

Before: PREGERSON, W. FLETCHER, and BYBEE, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Plaintiffs sue for damages under 42 U.S.C. § 1983. Appellants, two police officers, bring an interlocutory appeal of the district court's denial of their motion for summary judgment based on qualified immunity. We review such a denial de novo. *See Lee v. Gregory*, 363 F.3d 931, 932 (9th Cir. 2004). The parties are familiar with the facts, and we do not repeat them in detail here.

At issue is whether the district court erred in determining that a reasonable officer would have known that their warrantless, unconsented intrusion into the Shotland residence was not excused by the exigent circumstance exception to the Fourth Amendment warrant requirement. *See Saucier v. Katz*, 533 U.S. 194, 202 (2001); *United States v. Kunkler*, 679 F.2d 187, 192 (9th Cir. 1982). Based on the record before it, including all the evidence introduced by appellants, the experienced district court judge determined that a reasonable officer would have known that the intrusion was not excused by exigent circumstances.

In their brief to this court, appellants represent that a Los Angeles County Superior Court Judge in a suppression hearing found that exigent circumstances excused the warrantless entry of the Shotland residence. However, no records of any state court proceedings were put in the record in the district court. The only mention in the district court of a state court suppression hearing was a very short,

out-of-context excerpt contained in appellants' brief in support of their motion for summary judgment.

After it was brought to the attention of appellants at oral argument in this court that none of the state proceedings were in the record of the district court, appellants asked us to take judicial notice of a transcript of a state court hearing at the end of which the court denied a motion to suppress evidence seized at the Shotland residence. An examination of the transcript shows that there were two hearings in the state court. At the first hearing, the state court took evidence concerning what happened in the Shotland residence. At the second hearing, the state court denied a motion to suppress based on the evidence presented in the first hearing. Appellants ask us to take judicial notice only of the transcript of the second hearing. They have not provided us the transcript of the first hearing. Even if we were to take judicial notice of the transcript of the second hearing, it would be next-to useless, for we would not know the evidence upon which the state judge based his ruling.

We decline to take judicial notice of the transcript of the second hearing in the state court. There was nothing that prevented appellants from introducing that transcript (or, indeed, the transcripts from both hearings) in the district court, and nothing that prevented them from making the argument to the district court that

they now seek to make for the first time to us. We are unwilling to reverse the district court based on evidence never presented to it and not properly before us. *See Lobatz v. U.S. W. Cellular of Cal. Inc.*, 222 F.3d 1142, 1148 n.4 (9th Cir. 2000).

Based on the record in the district court and now before us, we affirm the court's denial of appellants' motion for summary judgment based on qualified immunity. Based on the record in the district court — indeed, even based on the transcript for which judicial notice is now sought — we have no way of knowing what evidence was presented to the state superior court and therefore no way of knowing the basis for that court's ruling. In fact, confining ourselves to the evidence presented to the district court, we have no way of even knowing that a state court judge ruled on a motion to suppress.

On remand from our decision in this interlocutory appeal, the district court is, of course, free to allow appellants to renew their motion for summary judgment, and to allow them to present whatever evidence they think appropriate to support such a renewed motion. We suggest that the district court may wish to consider late-filed state court transcripts in deciding whether to allow appellants to renew their motion. Whether to permit such a renewed motion, however, is a matter for the district court to determine in the exercise of its sound discretion.

The district court's decision at issue in this interlocutory appeal is AFFIRMED. The case is REMANDED to the district court for further proceedings.